In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1896

RICHARD LEE HENDRIX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that this Court's decision in *Almeida-Sanchez* v. *United States,* 413 U.S. 266, should be applied retroactively to invalidate the warrantless search of his vehicle at a fixed immigration checkpoint.

On March 17, 1972, at approximately 12:45 a.m., petitioner was stopped by Border Patrol officers at a fixed immigration checkpoint on Highway 86, seventeen miles northwest of Westmoreland, California, and approximately 49 road miles north of the Mexican border.[1] After petitioner told the officers that he was a United States

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[1]The checkpoint is described in *United States* v. *Baca*, 368 F. Supp. 398, 413 (S.D. Cal.).

citizen, they requested that he open the trunk of his car because they had observed that it was riding low in the rear as it approached the checkpoint. When petitioner was unable to unlock the trunk, the officers directed him to pull his car to the side of the road. The back seat of the car was removed, and the officers saw packages of marijuana in the trunk.

Petitioner's pre-trial motion to suppress the marijuana was denied. Following a jury trial in the United States District Court for the Southern District of California, he was convicted of having possessed marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to a three-year term of imprisonment subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2), to be followed by a special two-year term of parole.

On June 13, 1973, the court of appeals entered an order (Pet. App. F) holding the case for submission pending the decision of this Court in *Almeida-Sanchez*, which was decided on June 21, 1973. On July 9, 1973, a panel of the court of appeals affirmed petitioner's conviction, holding that *Almeida-Sanchez* does not apply to searches conducted at fixed checkpoints (Pet. App. A). A petition for rehearing was held in abeyance pending the court of appeals' consideration *en banc* of the applicability of *Almeida-Sanchez* to such searches.

On May 9, 1974, the court, sitting *en banc*, decided that *Almeida-Sanchez* should be extended to invalidate warranless searches of vehicles for illegal aliens by Border Patrol officers at fixed immigration checkpoints but that the rule should not be applied retroactively to such searches occurring prior to the date of the *Almeida-Sanchez* decision. *United States* v. *Bowen*, C.A. 9, No. 72-1012, petition for a writ of certiorari pending, No. 73-6848 (Pet.

App. C). On the basis of the decision in *Bowen*, the original order of affirmance in the present case was withdrawn, a new order of affirmance was filed, and the pending petition for rehearing was denied, on the ground that the search of petitioner's vehicle occurred more than a year prior to this Court's decision in *Almeida-Sanchez* (Pet. App. B).

Petitioner contends that the court of appeals' holding with respect to checkpoint searches should not be limited to post-*Almeida-Sanchez* searches. But that contention need not be considered if -- as we argue in our petition for a writ of certiorari in *United States* v. *Ortiz*, No. 73-2050[2] -- warrants are not required for checkpoint searches of vehicles for concealed aliens. We also argue in *Ortiz* that, even if warrants are required, the rule should not apply in the Ninth Circuit to cases, like the present one, in which the search occurred prior to that court's *en banc* decision in *Bowen*, which overturned a long line of prior decisions upholding checkpoint searches without warrants.

Only if the Court were to disagree with both of our contentions in *Ortiz* would it be necessary to consider petitioner's contention in this case, since the checkpoint search here took place not only prior to *Bowen* but also prior to *Almeida-Sanchez*. The issue whether *Almeida-Sanchez* should be applied retroactively to "roving patrol" searches conducted prior to that decision is presented in our petition for a writ of certiorari in *United States* v. *Peltier*, No. 73-2000, and the Court's resolution of that issue may bear upon the proper disposition of petitioner's similar argument with respect to checkpoint searches.

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[2]In *Ortiz*, the Ninth Circuit held, on the authority of its decision in *Bowen, supra*, that evidence seized in a checkpoint search conducted after the decision in *Almeida-Sanchez*, but before the decision in *Bowen*, must be suppressed.

We therefore believe that it would be appropriate to defer disposition of the present petition pending action on the petitions in *Ortiz* and *Peltier*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.